UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DOUGLAS AUTOTECH CORPORATION,

Respondent,

and

Case No. GR-7-CA-51428

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 822,

Charging Union.

_____/

DOUGLAS AUTOTECH CORPORATION'S
MOTION FOR SUMMARY JUDGMENT

On August 4, 2008, Douglas Autotech Corporation ("DAC") discharged all the bargaining unit employees at its Bronson, Michigan facility. These individuals lost their protection under the National Labor Relations Act ("Act") as "employees" when the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and Its Local 822 ("Union" or "UAW") illegally struck DAC on May 1, 2008 without first complying with Section 8(d)(3) notice requirements. The Act precludes these individuals from regaining the Act's protections unless and until DAC "reemploys" them.

General Counsel ("GC") apparently alleges these individuals regained protection under the Act because DAC "reemployed" the strikers when it ***locked them out*** on May 5, 2008. Neither the text of the Act nor any National Labor Relations Board ("NLRB") Decision or Order supports the GC's "reemployment through lockout" theory based on the undisputed facts in this case. To the contrary, Section 8(d)'s intent, the NLRB's subsequent interpretations of Section 8(d), and the Act's general purposes all support a finding that, as a matter of law, DAC never

"reemployed" these individuals and they never regained protection as "employees" under the Act. DAC lawfully discharged these Union members. DAC is entitled to Summary Judgment.

I. UNDISPUTED FACTS

For purposes of this Summary Judgment Motion, DAC assumes the following facts are undisputed. DAC manufactures parts for the automotive and heavy truck industry at its production facility in Bronson, Michigan. For many years, the Union represented DAC's production and maintenance employees for purposes of collective bargaining. The parties last Collective Bargaining Agreement ("CBA") expired on April 30, 2008. Beginning in February 2008, the parties started bargained a new CBA.

On Wednesday, April 30, 2008, Union representatives Phil Winkle, Mary Ellis and Frank Gruza gave DAC a written notice which stated:

> Wed. April 30, 2008
>
> This letter is to formally inform the Company that the U.A.W. Local 822 will be on strike at 12:01 am May 1, 2008.
>
> Respectfully,
>
> Phil Winkle
> Mary L. Ellis
> Frank E. Gruza

See Tab 1.

Prior to the May 1, 2008 strike, the Union did not file a Form F-7 with the Federal Mediation and Conciliation Service ("FMCS") as Section 8(d)(3) requires. Instead, unbeknownst to DAC, the Union first filed Form F-7 with the FMCS on May 5, 2008, five (5) days after the strike began. *See* Tab 2. Early in the morning on the same day (May 5, 2008), the Union made what it characterized as an "unconditional" offer to return to work. At the first bargaining session after the strike in the early evening on May 5, DAC provided the Union notice that it was locking out bargaining unit members. *See* Tab 3.

On May 7, 2008, DAC received notice from FMCS that FMCS had appointed a federal mediator to their bargaining file. This prompted DAC to investigate the date the Union sent its original F-7 notification to FMCS. DAC requested the Form F-7 from the Union through a letter dated May 9, 2008. *See* Tab 4. The Union ignored DAC's request for the Form F-7. DAC then made a FOIA request to the FMCS. DAC ultimately obtained a copy of the Union's F-7 notification early in the day on May 23, 2008. DAC first became aware on or about May 20, 2008 that: 1) the Union had gone on strike ***before*** submitting the required F-7 notification to FMCS, and 2) accordingly, the Union had engaged in an illegal strike. The Union continued to refuse to provide DAC their F-7 FMCS notice.

As soon as DAC knew that the Union had engaged in an illegal strike, DAC stated its position regarding the illegal strike to the Union and then reiterated its position in all subsequent bargaining sessions. In fact, on or about May 21, 2008, (the second bargaining session after the illegal strike ended and the first bargaining session after DAC learned the strike was illegal) at 12:04 pm, Bruce Lillie, DAC's chief bargaining spokesperson, told the Union bargaining committee that: "First, the strike was illegal. Meeting is no waiver of [DAC's] rights or remedies." DAC then made this or a similar statement in every bargaining session with the Union after the illegal strike and prior to terminating the bargaining unit members. *See* Tab 5.

The parties bargained intermittently in June and July, 2008 – a period which included a mutually agreed upon 30-day "cooling off period" to prepare for additional negotiations. This bargaining did not result in an agreement. During this time, DAC continued to administer benefit plans for bargaining unit members in accordance with its obligations under the Employee Retirement Income Security Act ("ERISA").

On August 4, 2008, DAC notified the Union and individual strikers that it was terminating them. DAC's termination letter stated as follows:

> As your Union has likely explained to you, as a matter of federal law, UAW Local 822 was required to file a notice with the Federal Mediation and Conciliation Service ("FMCS") thirty (30) days prior to an economic strike. This requirement exists to provide the parties 30 days to work with the federal mediator to resolve their dispute and avert a work stoppage. The Union did not provide its notice until five (5) days after the start of the strike, making the strike illegal under federal law.
>
> Because you participated in an illegal strike, you have lost any and all protection under the National Labor Relations Act including any right to continued employment. Consequently, your employment with Douglas Autotech is terminated effective immediately because of your participation in the illegal strike of May 1, 2008 and thereafter.

See Tab 6.[1]

On or about August 5, 2008, the Union filed the instant Charge. On February 25, 2009 Region 7 issued the instant Complaint.

II. ARGUMENT

A. The NLRB's standard for summary judgment

When considering a party's Motion for Summary Judgment, the NLRB will apply the same standard as that set forth in the Federal Rules of Civil Procedure, Rule 56(c). *Lake Charles Memorial Hospital*, 240 NLRB 1330 (1979). Thus, the NLRB will grant a Motion for Summary Judgment if "the pleadings . . . and admissions on file . . . show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Manville Forest Products Corp.*, 269 NLRB 390 (1984); *Inland Container Corp.*, 298 NLRB 715 (1990).

[1] From its inception, the Union's strike featured picket line threats to DAC representatives and even sabotage. Just hours after the Union walked out of the Bronson facility on May 1, management discovered that drill bits and bolts on one if its critical production machines had been tampered with and that another critical machine had been essentially disassembled, rendering it useless. *See* Tab 7.

B. Applicable legal principles

Section 8(d)(3) of the Act prohibits the termination or modification of a labor contract unless:

> [T]he party desiring such termination or modification . . . notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; ...

29 U.S.C. §158(d)(3). Where the requirements of Section 8(d)(3) are not met, the traditional employee protections of the Act do not apply in the event of a strike:

> Any employee who engages in a strike within any notice period specified in this subsection [Section 8(d)] . . . shall lose his status as an employee of the employer engaged in the particular labor dispute for purposes of Sections 158, 159 and 160 of this Title ...

29 U.S.C. §158(d).

Section 8(d) provides one (and only one) way for employees to regain the protections of the Act. The Act states that "such loss of [protected] status for such employee[s] shall terminate ***if and when he is [they are] reemployed by such employer***." *Id.* (emphasis added).

The Section 8(d) provisions "are a clear expression of Congressional intent to minimize the interruption of commerce resulting from strikes and the further use of mediation to assist parties in settling their labor disputes peaceably." *Boghosian Raisin Packing Co.*, 342 NLRB 383, 384 (2004). They are "part of the overall statutory scheme intended to encourage the peaceful resolution of labor disputes." *Id.* at 385. Indeed, "the whole thrust of [Section 8(d)] is to give [the FMCS] sufficient time to intervene in an effective manner in advance of a stoppage of work, rather than after it has occurred." *United Furniture Workers v NLRB*, 336 F.2d 738, 740 (D.C. Cir. 1964). *See also, Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963) (Section 8(d)

"must be interpreted in light of the dual purposes of the Act to protect certain activities and to substitute collective bargaining for economic warfare.").

The NLRB strictly applies the Act's penalties for failure to give notice; it has recognized that "Section 8(d) contains no exceptions and provides no mitigating circumstances justifying a failure to comply." *Boghosian Raisin Packing Co.*, 342 NLRB 383, 385 (2004). "In sum, the statute provides no basis for exempting [a] union and . . . strikers from the strict requirements of Section 8(d) or from the loss of status sanctions it imposes in the event of an infraction." *Id.* "The sole question is whether . . . the union, as the party desiring to modify or terminate the agreement, has [given] notices prescribed by the section. If the union did not, its failure to do so triggers the loss of status provision and the inquiry is over." *Id.* at 386. This is true even where the circumstances surrounding a union's failure to provide notice "yield a harsh result." *Id.* at 385.

Because employees lose all protections under the Act when their union fails to give the required notice, "...even unlawfully motivated adverse action against the employees [can]not be redressed under the Act" and traditional inquiries into the presence of anti-union animus do not apply. *Freeman Decorating Co.*, 336 NLRB 1, 5 (2001). *See also*, *Fort Smith Chair Co.*, 143 NLRB at 517 ("[The employer's] motive in discharging strikers is not a relevant consideration" in cases where the union has failed to give appropriate Section 8(d) notice).

C. As a matter of law, DAC's lockout cannot be construed as a "reemployment" of striking union members

There is no factual dispute here that:

- The Union, as the party seeking termination or modification of the expiring CBA, was required to give 8(d)(3) notice;
- The Union failed to give such notice until May 5, 2008;

- Employees struck DAC on May 1, 2008 - prior to the Union's 8(d)(3) notice.

Thus, as a matter of law, striking Union members lost all protections under the Act as of May 1, 2008. By the express language of the Act itself, the only way these illegal strikers could regain the Act's protections was for DAC to "reemploy" them.

By its plain meaning, the word "reemploy" denotes an affirmative act – as in the repetition of a previously performed act.[2] And, as only employers can "employ," any "reemployment" in this case requires a showing that DAC engaged in an affirmative act. The GC can point to no affirmative act.

It appears the GC's theory[3] is that when DAC locked out the illegal strikers on May 5, 2008, it engaged in the act of "reemployment" required to reinvest the illegal strikers with statutory protection. As an initial matter, it is absurd to suggest that an employer "reemploys" illegal strikers by preventing them from entry into its plant. In fact, since the existence of "employment" or "reemployment" is a matter of an employer's subjective intent (no one else can employ employees besides an employer), DAC's decision to lockout employees – its communication to strikers to "stay away" – is the very antithesis of the "reemployment" Section 8(d) contemplates. In other words, a lockout cannot be "reemployment" because "a lockout, by definition, ***clearly involves an employer's refusal to allow employees to work*** when they are ready and willing to do so." *Willamette Assn. of Plumbing and Heating Contractors, Inc.*, 125

[2] Webster's II New College Dictionary defines the Latin prefix "re-" as "again: anew".

[3] DAC tried to get more definition regarding the GC's case theory when it filed a Motion for A Bill of Particulars on March 3, 2009. Unfortunately, the NLRB Chief ALJ denied DAC's Motion on March 11, 2009. DAC has gleaned the GC's case theory from "bits and pieces" provided through various telephone conversations with NLRB Grand Rapids Resident Office representatives, who all are, or have been, involved in this case. During these conversations, it has been confirmed that the GC has no applicable case law to support its apparent "reemployment through lockout" theory. Of course, since the GC apparently has no obligation to further define their theory, DAC is left to guess as to how the GC intends to stretch the Act to support its complaint in this matter. In what appears to be a very important case of first impression, the GC's decision to play "hide the ball" regarding its legal theory and/or support therefore is inequitable and serves neither justice nor the purposes of the Act.

NLRB 924, 927 (1959) (emphasis added). *See also, Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 462 (2004) ("Respondent [called] employees and ***told them not to report*** ... [T]his conduct is in fact what a lockout is.") (emphasis added).

Moreover, in this case, DAC did not know that the Union engaged in an illegal strike until on or about May 20, 2008. The Union refused to respond to DAC's request for the FMCS notice. DAC requested that the Union provide the FMCS notice on May 9, 2008 in a letter from Bruce Lillie to Phil Winkle which stated:

> May 9, 2008
>
> Mr. Phil Winkle
> UAW, International Representative
> 1002 East South Street
> Jackson, Michigan 49203
>
> Dear Mr. Winkle:
>
> As per our discussion on May 8, 2008, I am requesting copies of all notices sent by the UAW to the Federal Mediation and Conciliation Service (FMCS) related to Douglas Autotech Corporation.
>
> If you have any questions, comments or concerns, please feel free to contact my office.
>
> Sincerely,
>
> Bruce Lillie
> Attorney at Law

See Tab 4. Around noon on May 21, 2008, on or about the day after DAC learned that the Union engaged in an illegal strike, DAC specifically told the Union (in the first bargaining session since DAC learned the strike was illegal) that the strike was illegal and DAC was not waiving any rights or remedies related to the illegal strike. *See* Tab 5. DAC did not "reemploy" the illegal strikers. Instead, as soon as DAC knew the strike was illegal, it told the Union it was preserving all its rights, including the right to terminate the illegal strikers.

Cases in which the NLRB ***has*** found "reemployment" sufficient to restore illegal strikers' statutory protections illustrate how silly the GC's "lockout as reemployment" theory is. In *Fairprene Industrial Products*, 292 NLRB 797 (1989), the union struck the employer without complying with the Section 8(d)(3) notice provisions. *See, id.* at 800. Despite the illegal strike and the illegal strikers' loss of statutory protection, the parties settled the strike and reached an agreement on reinstating the illegal strikers. *See id.* at 801-802. After reaching an agreement to reinstate the illegal strikers, the company terminated the strikers on the theory that they had lost the protection of the Act. *See id.* at 802.

The Administrative Law Judge, in an opinion which the NLRB adopted, found that the employer's termination decision was illegal because "when the full strike settlement agreement was reached and the company ***scheduled the employees to return to work***, the strike ended and the strikers were reemployed within the meaning of [Section 8(d)'s] provisions." *See, id.* at 803 (emphasis added). Thus, the only sort of "reemployment" that the NLRB has recognized as re-conferring statutory protection to illegal strikers is an employer's affirmative invitation to bring employees back to work – i.e., an employer's explicit decision to employ strikers "again."

The absurdity in the GC's theory continues when one considers that a lockout - the apparent "reemployment" the GC identifies here - is nothing more than the symmetrical opposite of a strike. Like a strike for a union, a lockout for an employer "is for the purpose of bringing pressure to bear on the [other party], so [it] will yield to the employer's bargaining position." *Avery Heights,* 343 NLRB 1301, 1306 (2004). "Lockout" is, therefore, the name given to an employer's economic weapon which is the equal and opposite of the union's strike. *See, e.g., Central Illinois Public Service Co.,* 326 NLRB 928, 932 (1998) ("The [Employer's] lockout was simply its economic weapon in response to the Union's economic weapon [e.g., a strike]."). *See also, American Ship Building Co. v. NLRB,* 380 U.S. 300, 311 (1965) ("[W]e cannot see that the

employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to ... strike."). This principle is so basic that it was recognized under the common law of work stoppages predating the Act. *See, e.g, Dail-Overland Co. v. Willys-Overland, Inc.*, 263 F. 171, 187 (N.D. Ohio 1919) ("'[L]ockout [is] but a euphemism for a strike"); *Iron Molders Union No. 125 v. Allis-Chalmers Co.*, 166 F. 45, 50 (7th Cir. 1908) (lockout and strike "are rights ... [which] are mutual and fairly balanced against each other.").[4]

Surely the GC would never advance the ridiculous notion that strikers could be "reemployed" because they went ***on strike***. But the employees here are no more "reemployed" by virtue of the Company's lockout - the deployment of its economic weapon against the union - than they would be if the Union chose to lawfully strike to exact concessions from the Company. In other words, "lockout" and "strike" contemplate equivalent but opposite principles; they are two sides of the same coin. One cannot encompass an element of "reemployment" while the other does not.

There is simply no support in NLRB case law for the GC's attenuated theory of "reemployment through lockout." This theory is an awkward and counter-intuitive attempt to create that which does not exist in this case - an intent by DAC to reemploy the illegal strikers. Because the GC cannot show that DAC "reemployed" any of the strikers on the undisputed facts of this case, there is no basis, as a matter of law, for cloaking the illegal strikers with the protection of the Act at any point after May 1, 2008. This is especially true in light of the NLRB's clearly stated position that the loss of Section 8(d) protection "contains no exceptions and provides no mitigating circumstances justifying a failure to comply." DAC's August 4 termination decision must stand as the exercise of DAC's legitimate prerogative against

[4] Other adjudicative bodies agree with the Board that a lockout is the very opposite of active employment. For example, under Michigan unemployment compensation law, a lockout is construed as a "labor dispute in active progress." *Smith v Employment Security Commission*, 410 Mich 231, 272-73 (1981).

unprotected illegal strikers. *See Boghosian,* 342 NLRB at 385. As stated in *Boghosian*, in light of the undisputed failure of the Union to issue the appropriate 8(d)(3) notice, "the inquiry is over." *Id.*[5] DAC's right to terminate is even more unassailable here because from May 21, 2008 forward, on or about the day after DAC learned the Union engaged in an illegal strike, DAC specifically told the Union the strike was illegal and that DAC was not waiving any rights or remedies related to the illegal strike. DAC did not "reemploy" the strikers.

D. The inability to show the requisite "reemployment" notwithstanding, the GC's position is contrary to the policy and purposes of the Act such that DAC is entitled to judgment as a matter of law

1. The GC's "lockout as reemployment" theory effectively allows the Union to circumnavigate the Section 8(d) requirements

Under the GC's "lockout as reemployment" theory, DAC effectively lost its right to terminate employees as of May 5, a point in time at which DAC was not yet aware the strike was illegal. It must be the GC's position, then, that if DAC had ***refrained*** from announcing a lockout in the face of the Union's unconditional offer to return to work on May 5, there would have been no "reemployment," and nothing would have reinvested the strikers with the protections of the Act until their eventual termination on August 4. This, however, makes no sense under existing NLRB law.

In the face of the Union's May 5 offer to return to work, DAC's options were threefold. If DAC had, in fact, refrained from announcing a lockout on May 5 and instead ***done nothing*** in response to the Union's unconditional offer to return to work, it could well have found itself in violation of the Act. *Eads Transfer,* 304 NLRB 711 (1991) (extended employer silence

[5] Nor can any affirmative act of reemployment be construed from DAC's compliance with ERISA requirements prior to August 4, 2008. The Act itself contemplates that employees may still be "employed" for other statutory purposes, as failure to comply with Section 8(d)(3) resolves the issue of employee status for purposes of the Act ***only***. *See* 29 U.S.C. §158(d) ("Any employee who engages in a strike within any notice period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute ***for the purposes of*** Section 158, 159 and 160 of ***this Act***"). Thus, whether and how an employer has treated employees for purposes of other statutes is not relevant to a determination of protected status under the Act.

following unconditional application for return to work rendered employer conduct unlawful). On the other hand, since an employer is not required to actually use the magic word "lockout" to create a lockout, DAC could presumably have engaged in conduct sufficient to put the Union on "constructive notice" that it had locked employees out. *See, e.g., Ancor Concepts, Inc.*, 323 NLRB 742 (1997), Finally, it could have accepted the Union's offer and literally "reemployed" the strikers, with all the attendant perils flowing from pre-strike misconduct and picket line threats.[6]

Accepting GC's theory, therefore, impermissibly gives to the law-breaking Union nearly complete control over the reemployment question and allows the union to unilaterally nullify its own violation of the Act and the consequences of that violation. This amounts to giving the inmates the keys to the jail. If a lockout is sufficient to "reemploy" the illegal strikers and thus cloak them in the Act's protections, as the GC apparently argues it is, unions can order strikes and essentially ignore their Section 8(d) notice obligations with virtual impunity. A union could strike without any F-7 notice to the FMCS. The strike would be illegal. Under the GC's theory, although the illegal strikers would initially lose the protections of the Act, the union could recast the illegal strikers as protected employees whenever it wished by simply making an unconditional offer to return to work – an action that, either through acceptance, the employer's express lockout, or other actions indicating as much – would precipitate "reemployment."

Such a result simply cannot be squared with the Section 8(d) statutory purpose specifically, or the aims of the Act, generally. First, allowing unions to ignore the FMCS notice requirement at their discretion runs directly contrary to the purpose of Section 8(d) which the NLRB has recognized as a "clear expression of Congressional intent to minimize the interruption

[6] Presumably, GC will argue DAC could at that point have also simply discharged the strikers for their illegal strike on May 1. The only problem with this assertion, of course, is that DAC did not at that point know the strike was illegal, in large part because the Union refused to respond to DAC's legitimate May 9, 2008 information request for the F-7 notice to FMCS. *See* Tab 4.

of commerce resulting from strikes and the further use of mediation to assist parties in settling their labor disputes peaceably". *Boghosian*, 342 NLRB at 384. Second, it would also ignore the Act's "overall statutory scheme intended to encourage the peaceful resolution of labor disputes" and replace the overall statutory scheme with strategic maneuvering. *Id.* at 385. Third, construing a lockout as "reemployment" would improperly circumscribe an employer's right to announce and prosecute an otherwise entirely lawful lockout - a right that has been recognized for decades. *See, e.g., American Ship Building,* 380 U.S. 300 (1965). In other words, construing a lockout as an automatic re-conferral of employee status will add an additional and unwarranted pitfall to an employers' use of their traditional economic weapon. *See, e.g., Hooker Chemicals v. NLRB,* 573 F.2d 965, 968 (7th Cir. 1978) ("Nothing . . . suggests that Congress intended to deprive the [8(d)] non-initiating party of its right to use economic weapons merely because the initiating party defaulted in its duty to notify the mediation services in a timely fashion."); *accord, United Artists Communications, Inc.*, 274 NLRB 75, 76 (1985).

2. The GC's overly broad construction of "reemployment" is contrary to the purposes of the Act as it would encourage labor strife

If ratified, the GC's tortured "reemployment" definition will unquestionably incent employers faced with illegal strikes of the type involved in this case to discharge illegal strikers at the first instance of unprotected status. The message sent to employers through the adoption of the GC's position would be crystal clear: act immediately and in the most aggressive manner possible to preserve your rights under the Act, lest the NLRB interpret any of your actions as a "reemployment." Faced with the risk that actions other than an actual, intentional invitation to return to work will be deemed a "reemployment," employers simply will discharge first and ask questions later.

Here, the GC's position means that on or about May 20, 2008, DAC should have immediately terminated all the illegal strikers instead of continuing to bargain after telling the

Union that it was preserving all its rights related to the illegal strike. Employers will be deterred from attempts to resolve labor disputes without resorting to discharging all bargaining unit members. Again, such a result cannot be squared with the explicit purpose of the Act, which, as expressed in Section 1 of the Act, is to "encourage practices fundamental to the friendly adjustment of industrial disputes . . . [and] the practice and procedure of collective bargaining". 29 U.S.C. §151.

Indeed, because it unjustifiably curtails an employer's right to deploy a lawful lockout, it is not overreaching to suggest that GC's theory will weaken statutory deterrents to strike violence and sabotage. The NLRB recognizes that employers may use lockouts "defensively," as a strategy to protect their property, machinery and inventory in the face of union threats of sabotage or violence. *See, e.g., C-E Natco,* 272 NLRB 502 (1984) (employer's lockout lawful where it was legitimately concerned over sabotage and safety); *Redway Carriers,* 301 NLRB 1113 (1991) (lockout lawful where it was due to employer's objectively based fears of violence). But under a "lockout as reemployment" theory, a union could strike in violation of Section 8(d), make threats of violence during the strike and then make an unconditional offer to return to work. This, in turn, would present an employer with a Hobson's choice of either: 1) actually reemploying employees (and surrendering its right to discharge them for unprotected conduct) and subjecting its property and inventory to the promised sabotage or 2) locking the employees out, thus protecting the property, and also absolving the employees of their illegal strike. This scenario is not fantasy - it is part of the fact pattern of this case. The GC's theory actually allows a union to gain advantage by leveraging violations of the Act.

3. The GC's position improperly interferes with the parties' respective economic weapons, their role in the collective bargaining process, and the free play of the parties' negotiations

The NLRB recognizes that although an employer is required to continue bargaining after a union strikes in violation of Section 8(d), it may use the illegal strikers' then unprotected status as leverage in negotiations:

> [An employer's] obligation to bargain with [a] union . . . [does] not end with the illegal strike; it [is] ongoing . . . That the union [has] placed itself in a vulnerable position . . . [is] not the [employer's] fault or its responsibility: [The employer is] entitled to press its advantage in negotiation.

Boghosian, 342 NLRB at 386. Thus, the NLRB has expressly recognized that the issue of striker "reemployment" in the Section 8(d) context should be, as it always has been, left to the free play of the parties' collective bargaining negotiations. This has always been true, as well, of otherwise lawful employer discharge decisions during a strike. On May 21, 2008, DAC began to press it advantage while at the same time it told the Union it was not waiving any rights or remedies related to the illegal strike. The GC's position effectively removes the issue of "reemployment" from the bargaining process and thereby deprives the employer of the leverage it gained from the union's unlawful act – leverage that the NLRB has expressly preserved in the past.

IV. CONCLUSION

The GC cannot prevail in this case unless it demonstrates, as a matter of law, that DAC "reemployed" the illegal strikers prior to their termination. In light of clear NLRB authority, the plain meaning of the Act's statutory language and the policies behind the Act itself, the GC cannot make this required showing. DAC is entitled to judgment as a matter of law on all of the Complaint allegations. The NLRB should dismiss this matter in its entirety.

Respectfully submitted,

VARNUM LLP

Dated: May, 18, 2009

By: Jeffrey J. Fraser

Jeffrey J. Fraser
Attorneys for Respondent
P.O. Box 352
Grand Rapids, MI 49501-0352
616/336-6000

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DOUGLAS AUTOTECH CORPORATION,

Respondent,

and

Case No. GR-7-CA-51428

INTERNATIONAL UNION, UNITED AUTOMOBILE , AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 822,

Charging Union.

_____/

PROOF OF SERVICE

I certify that on the 18th day of May 2009, I filed *Douglas Autotech Corporation's Motion for Summary Judgment* in the above-captioned matter electronically at www.nlrb.gov, and served a copy upon the following parties

by email and first class mail, postage prepaid:

Mr. Steve Carlson, Board Agent
National Labor Relations Board
Region 7 - Resident Office
Steven.carlson@nlrb.gov

Mr. Samuel C. McKnight
Klimist, McKnight, Sale, McClow & Canzano
248/354-9656 - Facsimile
smcknight@kmsmc.com

by first class mail, postage prepaid:

Local 822, UAW, AFL-CIO
608 Union Street
Bronson, MI 48028

Date: May 18, 2009

Amy J. Westrate

Amy J. Westrate